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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

SUZY DAVIS, EDWARD SMART, CECIL SYNDER and BEACHFRONT, U.S.A.,

Petitioners - Plaintiffs,

vs.

DARYL F. GATES AND THE CITY OF LOS ANGELES,

Respondents - Defendants.

[District Court No. CV 90-2660 RSWL]

[No. 91-56174]

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the summary judgment orders of the District Court, as affirmed by the Court of Appeals, upholding the constitutionality of Los Angeles Ordinance Section 63.44B(20) should be reversed.

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IN THE SUPREME COURT OF
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October Term, 1992

SUZY DAVIS, EDWARD SMART,
CECIL SNYDER, and BEACHFRONT,
U.S.A.

Petitioner-Plaintiff

vs.

DARYL F. GATES and THE CITY
OF LOS ANGELES

Respondent-Defendants

I PETITION FOR A WRIT OF CERTIORARI
TO THE NINTH CIRCUIT COURT OF APPEALS

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioners herein pray that a writ of Certiorari issue to review the judgment of the Ninth Circuit Court of Appeals entered in this action on September 14, 1992.

II OPINIONS BELOW

The unreported opinion of the Court of Appeals is printed in the Joint Appendix hereto. The orders of the District Court dated August 5, 1991 and September 30, 1991 are printed in the Joint Appendix hereto.

III JURISDICTION

This court has jurisdiction to review the judgment by Writ of

Certiorari under 28 U.S.C. Section 1254 (1). The judgment of the Court of Appeals was entered September 14, 1992. This petition for Writ of Certiorari will be filed on December 13, 1992.

IV CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved (First, Fourth, Fifth and Ninth Amendments and 42 U.S.C. Section 1983, and Los Angeles City Ordinance 63.44 B (20)) ("the Ordinance") are reprinted in the Joint Appendix.

V STATEMENT OF THE CASE

Petitioners seek to have the Ordinance declared unconstitutional. The Ordinance prohibits any person to: "Appear, bathe, sunbathe, walk or be in any public park, playground, beach or the waters adjacent thereto, in such a manner that the genitals, vulva, pubis, pubic symphysis, pubic hair, buttocks, natal cleft, perineum, anus, anal region, or pubic hair region of any person, or any portion of the breast at or below the upper edge of the areola thereof of any female person, is exposed to public view or is not covered by an

opague covering. This subdivision shall not apply to live theatrical performance performed in a theater, concert hall, or other similar establishment located on public land."

Petitioner are organizations and individuals, who are members of various national organizations of persons, who believe in the mental, spiritual and physical benefits of public nudity, nude sunbathing and nude swimming. They believe that nudist beliefs and philosophy can most effectively be communicated by women and men being nude in public places including the beaches. They say that segregated beach nudity presents an innocent and poignant contrast to the permitted commercial,

often offensive and obscene, nudity found in bars, movies, magazines, television and films. The expressive content of nudity serves as a beginning point for discussions by nudists with others who may have an interest in the nudist philosophy. The individual plaintiffs have been accosted, cited or arrested by police while bathing nude at public beaches. Many others would regularly bathe in the nude on beaches if it were not for the chilling affect of the Ordinance and its enforcement.

The City of Los Angeles manages and controls Venice Beach in Venice, California. Plaintiffs and other nudists have been prohibited from bathing in the nude, assembling,

announcing and promulgating the nudist philosophy at the Venice Beach because of the enforcement of the Ordinance. The methods of enforcement include warnings, physical removal, rough handling, issuance of citations, arrest, trial and imposition of penalties. The enforcement of the Ordinance violates plaintiffs rights under the Constitution and deprives them of their rights to freedom of expression, freedom of association, privacy, due process, liberty interests, and equal protection of the law. The existence of the ordinance has a chilling effect on plaintiffs' exercise of their First Amendment and other constitutional rights.

VI ARGUMENT

A. The City's Prohibition Of Nude Bathing Is Unconstitutional. Enforcement Is Not A Proper Exercise of Police Power

Over thirty years ago, Justice Douglas wrote "no one would suggest that the First Amendment permits nudity in public places." Roth v United States 354 U.S. 476, 512 (1957). Times have changed. Full nudity is now commonplace on television, in movies, bars, magazines, the theatre and our museums. It is cynical, morally and legally, to equate bathing nudity with displays which pander to purient interest deserving governmental control. The "evil" is in the mind of the beholder - an area beyond governmental interest or control. The undesired impact upon

individuals and families may be controlled successfully by segregated beaches.

This case presents the very question that Justice Douglas thought could not arise. That is, whether, and if so when and how, the Constitution compels the government to allow public nudity or nudity as part of a belief system.

One of America's most popular summertime activities is sunbathing. In Los Angeles it is an almost year-round activity. These activities are shared by millions of Americans regardless of social or economic status. Those that prefer nude bathing represent a significant number of all sun bathers. Those who bath partially clad represent an even larger number. One statistic

suggests that nearly thirty (30) million people have at some time in their lives engaged in social nudism in one form or another. Nudist groups have become highly organized in national and international societies. There are nudist associations with local chapters throughout the United States. International, national and local organizations have defined and promoted social nudism beliefs which for many have become the basic tenets of the nudist life style. The cornerstone of this life style is that nudity is not itself indecent. Public nude sunbathing is one of those individual rights protected by the Constitution. This nationwide movement promotes social nudism as a wholesome and healthful life style and seeks to

educate the public as to the spiritual beliefs of naturism. Richard B. Kellam, "To Bare or Not to Bare: the Constitutionality of Local Ordinances Banning Nude Sun Bathing," University of Richmond Law Review Vol 20 pp. 589-590.

Nude sunbathing began in this country in 1930 and began to flower in the 1950's. One organization, the Naturist Organization, claims over five hundred thousand (500,000) active members in the United States. The nudist philosophy has proponents and is practiced in 45 nations. Nudism is openly and legally practiced in many of these nations.

In most cities in the United States, including the city of Los Angeles, nudism groups are being socially

restricted. Kellam, supra p. 593.

B. Nude Sunbathing Is Protectible Under The First Amendment As Symbolic Speech

First Amendment rights and guarantees are broadly interpreted and universally protected. Thornhill v. Alabama 310 U.S. 88, 95 (1940). Freedom of expression is at the core of our structure of human rights. (Kellam, supra p. 599) and has earned a preferred and more zealously guarded position than any other guarantees. e.g. Kovacs v Cooper 336 U.S. 77, 88-96 (1949). The elevated protection assures unfettered exchange of ideas for bringing about "political and social changes desired by the people." United States v. Roth 354 U.S. 476, 484 (1957). The First Amendment protection is not limited to popular

mainstream beliefs.

> "All ideas having even the slightest redeeming social importance, unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion, have our full protection of the guarantees".

United States V. Roth, supra 354 U.S. at 488. Indeed, protection has been extended to adultery, Doe vs. Duling, 603 F.Supp. 960 (E.D. Va 1985) vacated 762 F2d 1502 (4th Cir 1986), sodomy, Hardwick vs. Bowers 760 F2d 1202 (11th Cir) revd 108 S Ct 284, communism, Stromberg vs. California 283 U.S. 359 (1931), labor activism (Thornhill, supra 310 US 88, nazism, (National Socialist

Party v Village of Skokie 432 U.S. 43 (1977) racism, totalitarionism, and transvestism City of Chicago vs. Wilson 75 Ill.2d 525, 389 N.E.2d 522, 524 (1978). Kellam supra p.p 600-601.

Nudity has social value. It is accepted in the Bible, paintings, sculptures, movies, dances, television, plays, stage shows, magazines, etc. Kellam supra p. 602., e.g. Bruns v. Pomerleau 319 F. Supp. 58 (DC Md 1970).

Nudity is not per se obscene or immoral as to children, absent eroticism. Nude dancing is protected even though it does not have traditional speech characteristics. It is afforded constitutional protection because it is "communicative in nature". Erznozik v. City of Jacksonville (1975) 422 U.S.

205, 213. (the court struck down a local ordinance prohibiting drive-in from showing nude movies where screen was visible to street.)

The Erznozik court, striking down a nudity ordinance said:

> "Rather it sweepingly forbids display of all filmings containing any uncovered buttocks and breasts irrespective of content or pervasiveness...The ordinance also might prohibit newsreel scenes of the opening of an art exhibit as well as shots of bathers at a beach. Clearly all nudity cannot be deemed obscene even as to minors-...Speech [e.g. nudity] that is neither obscene as to youths nor

subject to same other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable" [Erznozik, supra 422 U.S. at 213, emphasis supplied]

In Cohen vs. California, 402 U.S. 14, 20, 292 L.Ed.2d 284, 91 S.Ct. 1780 (1971) the Supreme Court said:

"...Under any test of obscenity as to minors not all nudity would be proscribed. Rather to be obscene such expression must in some significant way be erotic."

On a second issue, we believe that nudity which expresses certain beliefs is "symbolic speech" Tinker v Des Moines

Community School Dist. 393 U.S.505 (1969) (wearing black arm bands in protest of Vietnam War was protected symbolic speech.) See 43 Fordham L Rev 590 (1975) (comparing communicative and noncommunicating conduct.) The Supreme Court has protected, under the symbolic speech umbrella, such expressions as burning the American flag, refusal to recite the pledge of allegiance, display of offensive items to protest taxes, long hair to protest school regulations and the display of a communist flag. Kellam, supra 603-604.

Here the nude bather, like the wearer of black arm bands, engages in conduct to express an idea. If the idea symbolically expressed is neither

indecent nor obscene, the expression is permissible. Opponents say:

> "the implicit message conveyed by public nudity does not implicate the (protections of) the First Amendment...This is principally because nudity alone conveys no specific content to whatever message is communicated."

Memorandum Opinion, Woodlock D.J. April 4, 1988, Craft v Hodel (D.Mass 1988).

This argument ignores the very nature of symbolic communication. Rarely do objects alone convey a meaning unless viewed in the social context in which they are found. Two crossed

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pieces of timber have no meaning unless we view them in context of Christianity; a black arm band neither offends nor conveys a message until it is seen in context with a Vietnam protest; a swastika means little until it is associated with nazism. The test as to nudity rests in the social context of the nudist community. The total circumstances of nudism and its message to the community must be considered. Even indecent exposure does not rest upon nudity alone but upon the actions or statements of the person exposing himself. Topless dancing has another meaning, a nude painting another and a nude scene in a movie has another. A group of nudes at a beach has yet

another. Neither this Court nor defendants can deny that plaintiffs' wish and intent is to share beliefs and make a statement by their nudity. They have sworn this is true. There is no contrary evidence. There is strong support of beach nudity as a communicative message. See Clark vs. Community for Creative Non-Violence 468 U.S. 288, 293 (1984). Can we not also assume that "shirtfree" appearances at the sea shore constitute protected expressive conduct? The protection of nudity as expressive conduct is predicated on a distinct philosophy and life style. The idea protected is that the human body is wholesome and that nudity is decent. South Fla Free

Beaches, Inc. vs. City of Miami 734 F2d at 609 (11th Cir 1984) Nudity alone (like a black arm band) may not be entitled to Constitutional protection. But where it is combined with a mode of expression entitled to First Amendment protection, nudity is protected speech. South Florida Free Beaches vs. City of Miami supra 734 F2d at 609.

As the dissent said in Barnes, it is only because nude dancing performances may generate emotions and feelings of eroticism and sensuality among the spectators that the state seeks to regulate. The state assumes excited thoughts by spectators may lead to increased prostitution and the

degradation of women. We question the assumption as it relates to beach nudity. Sexual stimuli is pervasive in our social environment. Notwithstanding the means, generation of thoughts, ideas, and emotions is the essence of communication. The nude element of nude dancing performances cannot be neatly pigeonholed as mere "conduct" independent of any expressive component of the dance. So it is with beach nudity.

C. The Authorities Against Nude Bathing Are Not Persuasive In This Context

Federal cases that have addressed the constitutionality of ordinances

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prohibiting nude sunbathing have held nude sunbathing is not an "expression" protected by the First Amendment. South Florida Free Beaches Inc. v. City of Miami 548 F.Supp 53 (N.D. Fla. 1982 aff'd,. 734 F.2d 608 (11th Cir. 1984); Chapin v. Town of South Hampton 457 F. Supp 1170 (E.D. NY 1978); Williams v. Hathaway 400 F.Supp 122 (D. Mass 1975) affm. sub nom. Williams v. Kleepe 539 F2d 803 (1st Cir. 1976).

One court held that nude sunbathing is "fundamentally individualistic and personal, rather than expressive or communicative." Williams v Hathaway supra 400 F.Supp 122, 126.

While it is thought that nudity itself is not obscene, [Erznozik vs. City of Jacksonville supra 422 U.S. at

213] It has also been held not to be communicative. Chapin v. Town of South Hampton 457 F Supp 1170, 1174 (E.D. N.Y. 1978)

Yet these cases did not involve or recognize the symbolic expression of the nudist philosophy by large numbers of nude sunbathers or nude organizations. The Eleventh Circuit held that "nudity is protected as speech only when commenced with some mode of expression which itself is entitled to First Amendment protection". South Florida Free Beaches, Inc vs. City of Miami, supra, 734 F.2d at 610.

These courts, we believe, fail to consider nudity in the social context in which it occurs. Whether or not communication occurs rests with the

person or persons initiating the communication. Only the nudist knows if and what he intends to communicate. The means chosen is solely within his discretion, whether it be a flag, arm band or a nude body. None of the cases cited gave any consideration to the message or thoughts the nude person intended to convey. The bona fides of the nude bather's intent is, of course, subject to scrutiny. However the petitioners tell us that they are part of nationally organized associations which openly advocate nude sunbathing as a medium for expressing certain legitimate nudism beliefs and doctrine worthy of societal and Constitutional protection. These groups, through their literature and through their magazines,

present nude sunbathing as communicating an idea, a belief and a message that nudism is a healthy and wholesome lifestyle. There are today said to be millions of persons who subscribe to the nudist philosophy. There are several European nations which recognize the right of the nudist to bathe without clothing. The widespread assertion of the need and right to nudism is alone enough to establish it as a symbolic communication.

There are marked similarities between the communication of nude sunbathing and other protected behavior. In Erznozik v City of Jacksonville 422 U.S. 205, 211 n.7 (1975) the Supreme Court, finding nude scenes protectible, said such scenes as pictures of nude

persons in a book, "must be considered as part of the whole book." Similarly, the context was controlling in Schad v Mt Ephram 452 U. S. 61 (1980) (nude dancing as live entertainment) and in Doran v Salem Inn Inc. 422 U.S. 922 (1974) (topless dancing). We believe nude appearances at the seashore constitute expressive conduct protected to some extent by the First Amendment. Clark vs. Community for Creative Non-Violence 468, U.S. 288 (1984).

D. The Decision In Barnes Relied Upon By The Court Below Is Distinguishable

This Court's decision in Barnes v. Glen Theatre 501 U.S. __, 115 LEd 2d 504, 111 Sup Ct 2456 (1991) is

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distinguishable in that it deals with a public indecency law which proscribed nude dancing.

The statute was applied to such dancing because it encouraged "prostitution, increases sexual assaults and attracts other criminal activity" Barnes, supra 501 U.S. __, 115 LEd 2d 504. This charge cannot be laid to nude sunbathing.

Nudity qua nudity itself is not evil. The beholder perceives the nude body as good, neutral or evil.[1] The

[1] Clark v. Community For Creative Non-Violence 468 U.S. 288 (Nudity is not inherently wrong or indecent) United States v. Roth 354 U.S. at 488 ("ideas hateful to the prevailing climate of opinion have our full protection of guarantees") Schad v. Mt Ephram, 452 U.S. 61, 66 (1981) ("Nudity alone does not place otherwise protected material outside the mantle of the First Amendment; Barnes vs. Glen Theatres 111 U.S. Sup Ct 2456, 2474 (1991) (dissent). ("The nudity is itself an expressive component of the dance, not merely incidental conduct").

Barnes court reviewed its prior holdings which protected nude dancing as expressive conduct under the First Amendment (Doran v. Salon Inn 422 U.S. 922, (1975); California v. LaRue 409 U.S. 109, 118 (1972); Schad v. Borough of Mount Ephram 452 U.S. 61, 66 (1981)) The Barnes court concluded

> "that nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeter of the First Amendment"

Barnes, supra at 507.

The court decided the case on whether the indecency statute was a valid "time, place and manner" restriction.

The public indecency statute was justified despite its incidental

limitations on some expressive activity. But here, unlike the Barnes situation, the absolute prohibition of nude beach bathing does not even address how much restriction on First Amendment freedom is permissible. It fails to explain how an absolute restriction is necessary to the furtherance of the government interests. The Barnes plurality said

"...Indiana's requirement that the dancers wear at least pasties and a g-string is modest, and the bare minimum necessary to achieve the state's purpose." Barnes, supra at 511.

The Ninth Circuit did not address this issue. For this reason alone, review should be had.

The restriction in Barnes was far less that the restriction here. The

City prohibits hundreds of its citizen from bathing in the nude. In effect the City states there is no spot on the many city beaches where nudists can be segregated, if necessary, and bathe in the nude. Surely one or more segregated portions of public beaches can be found where clothing optional bathing could be permitted. White House Vigil vs. Clark, supra 746 F.2d at 1528. In fact, authorities have for years turned a blind eye to nude bathing up and down the California coast. This being so, why should petitioners be exposed to arrest and humiliation?

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E. Regulation Of Expressive Nudity Must Meet Conflicting Needs

Having concluded that nude sunbathing is protected by the First Amendment, the question then is whether any suitable limitations are available under which bathing may proceed. Clark vs. Community For Creative Non-Violence, 468 U.S. 288 (1984). The Ordinance is not expressly based upon the content or subject matter of the speech. Arguably, it is content neutral and simply regulates protected activities, requiring that they be carried on while clothed. The regulation must therefore be evaluated under the test applied to time, place and manner restrictions on speech.

A valid time, place and manner restriction must: (1) be justified without reference to the content of the regulated speech, (2) serve a significant important governmental interest, (3) be narrowly tailored to serve that interest and (4) leave open ample channels for communication of the information, the expression of which it restricts. Clark supra, 462 U.S. at 293.

(1) Can The Ordinance Be Justified Without Reference To The Content Of Regulated Speech?

Clearly no. Nudity qua nudity is not inherently wrong or indecent. Nudity itself is not obscene. The right to espouse the nudist philosophy is protectible. Clark vs. Community For Creative Non-Violence, supra at 288.

(2) Does The Ordinance Serve An Important Government Interest?

It is proposed that preservation of the seashore as a beach available for the enjoyment of all persons, and prevention of the preemptive effect nude bathing would have on the majority's use of the public beach is an important government interest. People vs. Holdman, 500 N.E.2d 297, 301 (N.Y. 1986) and Chapin vs. Town of South Hampton supra 457 F.Supp at 1176. Nudity significantly intrudes upon others who do not seek it out and may be offended by it Cf Clark, 468 U.S. at 300 ("Lafayette Park and others like it are for all peoples. Their rights are not to be trespassed even by those who have

some statement to make"). In People vs. Craft, 509 N.Y.S.2d 1005, 1009, the government's objective to protect the general public from being accosted by offensive conduct in public places was legitimate. In State vs. Turner 382 N.W. 2d 252, 255 (Min. App. 1986) the protection of the society's norms was a legitimate legislative goal. (see also Bowers vs. Hardwick, 106 S. Ct. 2841, 2846 (1986) "The majority's moral sentiments may provide an adequate basis for prohibiting victimless conduct")

On the other hand, the nudist's right to state his philosophy as he choses may not be foreclosed without a meaningful attempt to accommodate his needs in balance with governmental interest or societal disapprobation.

Justice Douglas long ago warned of the danger of such suppression:

> "Any test that turns on what is offensive to the community's standards is too loose, too capricious, too destructive of freedom of expression to be squared with the First Amendment. Under that test, juries can censor, suppress, and punish what they don't like, provided the matter relates to "sexual impurity" or has a tendency "to excite lustful thoughts." This is community censorship in one of its worst forms. It creates a regime where in the battle between the literate and the Philistines, the Philistines are certain to win..."

Roth, supra, at 512.

"Thus, if the First Amendment guarantee of freedom of speech and press is to mean anything in this field, it must allow protests even against the moral code that the standard of the day sets for the community..."

Roth supra, at 512-515.

So, even though the protection of the privacy of adults and children who might be offended by nudity is a substantial and protectible government interest, (Cohen vs. California 403 U.S. 15, 18 (1971)) it is apparent that restrictions of the right to nude bathing can be regulated only in a manner which reasonably protects the rights of nudists also.

(3) Is Regulation Narrowly Tailored

The decisive inquiry here is whether the means employed by the government is broader than is needed to advance its substantial interests. White House Vigil vs. Clark supra, 746 F.2d at 1528. The government is required to select the means which least restricts the first amendment rights to achieve its substantial interests. Government regulations need not be the least restrictive means of serving substantial government interest but they may not be unnecessarily restrictive. Under the White House Vigil decision, a regulation may restrict expression where restriction is necessary and unavoidable to achieve a substantial government

end. These ends would be served if certain beaches or parts of beaches were set aside along the seashore for nude bathing. This has been done before.

These beaches are allowed by the government to exist de facto in California and elsewhere.

There are those that argue that doing so would legitimate what has traditionally been viewed as a public nuisance. Others have complained that segregated beaches would reduce in absolute terms the amount of beach area available to the bathing population as a whole. This overlooks the obvious fact that nudists are a part of the population and also have needs and rights.

(4) Does The Regulation Leave Open Ample Alternative Channels Of Communication?

Some say other channels for communicating these views are still open, in print and broadcast media, the streets and the seashore itself. We would protest this. No one requires the nude bar owner to move his bar outside of city limits, or the theatre owner to move his theatre outside away from the community offended, or the wearer of the black arm band not do so on the main street. Freedom of speech may not be capriciously burdened.

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F. Nude Sunbathing Is Protectible As A Right Of Association

The Ordinance interferes substantially with the sunbather's right of association. The right also may only be limited by reasonable legislation regulating time place and manner. Again the heart of the issue is that nudists should be permitted on the beaches. They are a segment of society entitled protection. Nude bathing is a wide spread associational activity borne of a desire to share common beliefs and philosophies regarding nudism. See Brun supra 319 Fed Supp 58; Contra. South Fla Free beaches Inc. vs. City of Miami 734 F2d 608 (11th Cir 1984). A more

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liberal view is that the right of association can be interpreted as a right "to simply meet with others" Wilson vs. Taylor 733 F2d 1539 1543 (11th Cir 1984). Some say that the courts may accept the right of association argument for nudism but insist that such association may only occur when persons are fully clothed. South Fla Free Beaches, supra. The nudist should be allowed to make that choice.

G. Nude Sunbathing Is A Protected Liberty Interest

The ordinance unconstitutionally infringes on the nudist's personal liberty and right of autonomy. The due process clause (Fourteenth Amendment) has been applied to protect a wide array

of liberty interest choices in procreation, hair length, marriage, contraception, abortion, et cetera. Roe vs. Wade (1973) 410 U.S. 111, 152-155, Kellam, supra 614. This right includes the right "to be let alone in the governance of those activities which may be uniquely personal". This includes the individuals right to be free from state regulation of his "personal appearance". Kelly vs. Johnson 425 U.S. 228, 241 (1975). Each person has the right to do everything which injures no one else. Graven Personhood, "The Right To Be Left Alone". 1976 Duke L.J. 699. Williams vs. Kleepe (1st Cir. 1976) 539 F.2d 803 allowed that nude sunbathing as a liberty interest is entitled to some constitutional

protection, balanced against the state's legitimate interest in its regulation. Williams vs. Hathaway supra 400 F. Supp at 127. Nude sunbathing is a significant personal liberty interest (Williams vs. Kleepe supra 300 F. Supp at 127) and thus should be accorded intermediate scrutiny. The extent to which the governmental intrusion is confined to the legitimate public interest is relevant. (Kellam, supra p. 618 footnote 137). The Hathaway court approved a total ban on nude sunbathing based on the state's justification including plant life, traffic, parking and trespass on private property. These types of justification, if indeed they are justifications at all, should not be insuperable. Some of

these problems are attributable to clothed as well as nude bathers. In any event, the state interests argued, weighed under an intermediate level of scrutiny, poses a small barrier in the contrast to the liberty interest to be protected.

H. Nude Sunbathing Is Consistent With Contemporary Morality And Should Not Be Over Regulated

Thirty years ago, complete nudity would have been thought to be obscene. Not today. Miller vs. Civil City of South Bend 904 F.2d 1081 (7th Cir 1990) reversed; Barnes vs. Glenn Theatre supra, 111 S Ct. 2456. The Miller court discussed this question at length.

"It is worth pausing a moment to ask why nudity as

//

titillation or outrage is relative rather than absolute. In a society in which women customarily go about in public bare-breasted, there is not shock value in a bare breast. Since then [Victorian England] female dress has become progressively less modest, and today many decent women appear in public in states of undress (mini-skirts, hot pants, slit skirts, body stockings, see-through blouses, decolletage becoming outright topless evening wear) that would have been considered nakedness, or the garb of prostitutes, thirty years ago. A striptease that ended in a degree of nudity is no longer suggestive of preparations for sex. A striptease that left

the stripper garbed as she might be for an expedition to the supermarket - might lack erotic punch today."

In any event there is no contention that the stripteases of "Kitty Kat" dancers are obscene. It would be difficult to make such a contention with a straight face at a time when an actor respectable in the eyes of many people can be found in posing in the nude for men's magazines. Douglas v. Hustler Magazine, Inc., 769 F.2d 1128 (7th Cir. 1985).

It is naive, indeed hypocritical, to contend that beach nudity is any less protectible than erotic dancing or for that matter any less expressive. Barnes vs. Glen Theatre, supra, 111 S. Ct 2456

("Nudity alone does not place otherwise protected material outside of the mantle of the First Amendment", "The nudity itself is an expressive component of the dance." Barnes vs. Glenn Theatres, supra, 111 S. Ct. 2454. Likewise, how hard is it to believe that the nude bather is expressing his or her philosophy about the activity? Should the standard of decency be higher on the beach than in a bar or a centerfold or a television? Should nudity be limited to large screens in every movie in the land but not its beaches? Restricted nude beaches are appropriate by modern standards.

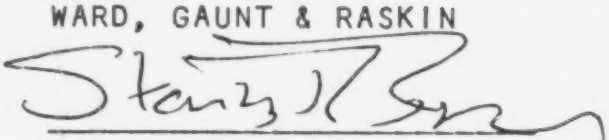
VIII CONCLUSION

For these reasons we respectfully submit the District Court's Orders as affirmed by the Court of Appeals should

be reversed and the Ordinance should be found invalid. It is requested that review be granted.

DATED: December 11, 1992

WARD, GAUNT & RASKIN



Stanley R. Raskin
Attorney for Petitioner-
Plaintiffs

APPENDIX A

FILED
SEPTEMBER 14, 1992
CATHY A. CATHERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SUZY DAVIS, EDWARD SMART, CECIL SNYDER, AKA CECIL CINDER individually and on behalf of all others situated; and BEACHFRONT USA, INC., unincorporated and incorporated associations,	No. 91-56174 D.C. No. CV-90-2660 RSWL
Plaintiffs-Appellants,	
v.	
DARYL F. GATES, Chief of Police of the City of Los Angeles; and the City of Los Angeles; and the County of Los Angeles	MEMORANDUM
Defendants-Appellees)	

Appeal from the United States District Court For The Southern District Of California Ronald S.W. Lew, District Judge, Presiding

Submitted July 7, 1992**
Pasadena, California

Before: FLETCHER, O'SCANNLAIN and KLEINFELD, Circuit Judges

Plaintiffs, organizations and individuals who believe in benefits of public nudity, appeal the grant of summary judgment in favor of the City of Los Angeles and other defendants, denying

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir.R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

injunctive and declaratory relief from a city ordinance that prohibits inter alia nude sunbathing. We affirm.

Facts

Plaintiffs are organizations and individuals who are members of various national organizations of persons who believe in the mental, spiritual and physical benefits or public nudity, nude sunbathing and nude swimming.

The city of Los Angeles manages and controls Venice Beach. City Ordinance 63.44 B (20) (the "Ordinance") prohibits nudity in public areas including public

beaches and parks. Plaintiffs allege that they have been prohibited from bathing in the nude, assembling, announcing and promulgating the nudist philosophy at Venice Beach because of the enforcement of the ordinance. Plaintiff Edward Smart alleges he was arrested and prosecuted for "buttocks' exposure." Plaintiffs allege that enforcement of the ordinance violates plaintiffs' rights under the Constitution and deprives them of their rights to freedom of expression, freedom of association, privacy, due process and equal protection of the law. Plaintiffs also claim that the existence of the ordinance has a chilling effect on their exercise of their First Amendment and other constitutional rights.

Plaintiffs brought suit in May, 1990, seeking declaratory and injunctive relief under the First, Fourth, Fifth and Ninth Amendments and 42 U.S.C. Section 1983. After the district court granted defendants' motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), plaintiffs filed a second amended complaint in November, 1990. The parties filed cross motions for summary judgment, and the district court granted the defendants' motion on August 2, 1991. The court denied plaintiffs' motion for reconsideration in an order dated September 30, 1991.

STANDARD OF REVIEW

"A grant of summary judgment is reviewed de novo to determine whether, viewing the evidence in a light most

favorable to the nonmoving party, there are any genuine issues of material fact and whether the district court applied the relevant substantive law." Izung v. State Farm Fire and Casualty Co., 873 F.2d 1338, 1339-40 (9th Cir. 1989).

DISCUSSION

A. Jurisdiction

Defendants challenge this court's jurisdiction claiming that plaintiffs lack standing. They also contend that relief based on the incidents alleged in the complaint is barred by the statute of limitations.

"Courts require a plaintiff to have a personal stake in the outcome of a case to warrant [his or her] invocation of federal-court jurisdiction and to justify exercise of the court's remedial

powers on his behalf." EMI ltd. v. Bennett, 783 F.2d 994, 996 (9th Cir.) (citation omitted), cert. denied, 469 U.S. 1073 (1984). The plaintiff must allege a "distinct and palpable injury to himself" that is "likely to be redressed by a favorable decision." Id. at 996.

Plaintiffs Suzy Davis and Edward Smart allege that they have been arrested for violating the ordinance in the past, that they desire to bathe nude in the future and that the ordinance has a chilling effect on the exercise of their First Amendment right of expression due to threat of prosecution. We find they have standing because they have sufficiently alleged specific injury from the challenged ordinance,

and shown that a decision in their favor would redress that injury.

We also reject defendants' statute of limitations argument. The fact that Suzy Davis alleges that she was last cited and prosecuted under the ordinance in 1986 does not preclude relief here. The basis of the plaintiffs' claims in this case is the continuous chilling effect of the ordinance prohibiting plaintiffs from bathing nude.

B. Basis for District Court's Decision

Plaintiffs first contend the district court granted defendants summary judgment based on procedural default rather than on the merits. This argument is without merit. In its September 30, 1991, order, the court made clear that "[I]n granting

Defendants' summary judgment motion, the court ruled on the merits."

Plaintiffs claim that the district court erroneously ruled against them because they failed to file an opposition brief to defendants' summary judgment motion; this ruling, they contend, was "based upon an allege violation of Local Rule 7.9...." Local Rule 7.9 permits the court to grant a motion when the nonmoving party does not oppose. However, as the district court pointed out in ruling on the plaintiffs' motion for reconsideration, Rule 7.9 implicitly requires the court to look at the underlying paperwork to determine whether or not summary judgment should be granted on the merits. The district court did this, and ruled in defendants'

favor on the merits.

C. Summary Judgment was Proper

Plaintiffs contend that the ordinance infringes their rights to freedom of expression and freedom of association. However, a recent Supreme Court decision upholding Indiana's public nudity statute is fatal to their claims.

> [W]hen 'speech' and 'non-speech' elements are combined in the same course of conduct, a sufficiently important governmental interest can justify incidental limitations on First Amendment freedoms. . . . [A] governmental regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Barnes v. Glen Theatre, Inc., 111 S.Ct. 2456, 2461 (1991) (quoting United States v. O'Brien 391 U.S. 367, 376-77 (1968).

At issue in Barnes was the application of Indiana's statute banning public nudity to a nude dancing establishment. Applying the O'Brien test to the statute, the Court found it to be a constitutionally permissible regulation. The statute furthered "a substantial government interest in protecting order and morality" that was "unrelated to the suppression of free expression." Glen Theatre, 111 S.Ct. at 2462. The Court specifically rejected the notion that "restricting nudity on moral grounds [is] necessarily related to expression," Id.: "We cannot accept the view that an apparently limitless

variety of conduct can be labelled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." Id. (quoting O'Brien, 391 U.S. at 376). Finally, the state's requirement that dancers "wear at least pasties and a G-String" was "the bare minimum necessary to achieve the state's purpose." Glen Theatre, 111 S.Ct. at 2563.

Barnes clearly governs this case. The ordinance is the same kind of public morals statute the Supreme Court upheld. Specifically, the statute is constitutionally sound despite its "incidental limitations" on plaintiffs' rights to free expression and association. The ordinance targets public nudity, not whatever message

plaintiffs express by being nude in public. "Public nudity is the evil the state seeks to prevent, whether or not it is combined with expressive activity." Id.

We thus affirm the decision of the district court.

AFFIRMED.

APPENDIX B

ENTERED
CLERK, U.S. DISTRICT COURT
September 30, 1991
CENTRAL DISTRICT OF CALIFORNIA
By Deputy

FILED
September 30, 1992
CLERK U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
By Deputy

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SUZY DAVIS, EDWARD SMART, CECIL SNYDER, AKA CECIL CINDER individually and on behalf of all others situated; and BEACHFRONT USA, INC., unincorporated and incorporated associations,	No. 91-56174
Plaintiffs,	
v.	
DARYL F. GATES, Chief of Police of the City of Los Angeles; and the City of Los Angeles; and the County of Los Angeles	No. 90-2660 RSWL (Tx)
Defendants,	ORDER

Plaintiffs in the above captioned action moved for reconsideration of the Court's grant of Defendants' motion for summary judgment. Defendants timely opposed the motion. The matter was heard on September 16, 1991 at 9:00 A.M. After considering the moving and opposing papers, and having heard argument of counsel, the Court hereby issues the following order:

Plaintiffs' motion for reconsideration is DENIED.

I. Discussion

Plaintiffs moved for reconsideration of the Court's August 4, 1991 order granting Defendants' motion for summary judgment. Plaintiff argued, inter alia, that in granting the motion pursuant to Local Rule 7.9 the Court did

not consider the merits of the motion, and thus had ruled improperly.

Plaintiff is incorrect. In granting Defendants' summary judgment motion, the Court ruled on the merits.

A. Local Rule 7.9

Local Rule 7.9 permits the Court to grant a motion when the non-moving party does not oppose. Implicit in Local Rule 7.9 is the requirement that that Court grant the motion only if the motion warrants it on the merits. On Defendants' motion for summary judgment, as Plaintiffs concede in the present motion, there were no genuine issues of material fact for a jury to decide. That being the case, a ruling on the merits of Defendants' summary judgment motion was warranted.

1. The Merits of Defendants' Motion For Summary Judgment

Plaintiffs instituted the underlying action for injunctive and declaratory relief, challenging the constitutionality of a City of Los Angeles (the "City") ordinance that prohibits nude sunbathing. Plaintiffs alleged that enforcement of the ordinance violated their right to expression, association, due process, privacy, liberty and equal protection under the United States Constitution.

Defendants moved for summary judgment. They argued that Plaintiffs' nude sunbathing was not protected expressive activity. They also submitted that the City's ordinance was a legitimate expression of the City's

polic power.

The Court agreed with Defendants' position and ruled accordingly. The court first found that the First Amendment did not provide Plaintiffs with a constitutional right to sunbathe or associate in the nude. See South Florida Free Beaches v. City of Miami, 734 F.2d 608 (11th Clr. 1984). The Court also found that the City's ordinance is designed to protect morality and social order and not to prohibit expressive activity. See Barnes v. Glen Theatre, __ U.S. __, 111 S.Ct. 2456 (1991). On these bases, the Court determined that the ordinance's restrictions are justified despite their possible incidental limitations on some expressive activity.

II. Conclusion

When it granted Defendants' motion for summary judgment, the Court ruled on the merits and found the City of Los Angeles' ordinance to be valid. This being so, Plaintiffs' motion for reconsideration is DENIED.

IT IS SO ORDERED

DATED: September 27, 1992

Ronald S. W. Lew

Ronald S.W. Lew

United States District Judge

CV 90-2660-RSWL(Tx) - Suzy Davis, et al v. Daryl F. Gates, et al.

Plaintiffs' motion for reconsideration

APPENDIX C

FILED
August 2, 1991
CLERK U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

ENTERED
CLERK U.S. DISTRICT COURT
August 5, 1991
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SUZY DAVIS, EDWARD SMART, CECIL SNYDER, AKA CECIL CINDER individually and on behalf of all others situated; and BEACHFRONT USA, INC., unincorporated and incorporated associations,	)	No. 90-2660 RSWL
Plaintiffs,	)	
v.	)	
DARYL F. GATES, Chief of Police of the City of Los Angeles; and the City of Los Angeles; and the County of Los Angeles	)	ORDER
Defendants.	)	

Defendants in the above captioned action have moved for summary judgment. Plaintiffs have not filed an opposition. Plaintiffs have moved for summary judgment. Defendants timely opposed Plaintiffs' motion. The motions were set for oral argument on July 29, 1991 at 9:00 a.m. After review of the papers filed, the Court removed the matter from the Court's law and motion calendar pursuant to Fed. R. Civ. P. 78. Now having again reviewed all of the papers filed, the Court hereby issues the following order:

Defendants' motion for summary judgment is GRANTED. Plaintiffs' motion for summary judgment is DENIED as moot.

Discussion

Plaintiffs have not filed an

opposition to Defendants' motion for summary Judgment. Local Rule 7.6 requires a party opposing a motion to file and serve a either an opposition or a notice of nonopposition at least 14 days prior to the date set for hearing of a motion. Pursuant to Local Rule 7.9, the Court may deem Plaintiffs' failure to file an opposition as consent to the granting of the motion. Because the proof of service appears proper, there is not apparent reason for the Court to deny Plaintiffs' motion. In addition, the Court notes that Plaintiffs' counsel has previously been

sanctioned for failure to appear at a hearing. Accordingly, Defendants' motion is granted.

Plaintiffs' motion for summary judgment is denied as moot.

IT IS SO ORDERED.

DATED: August 2, 1991

Ronald S.W. Lew
Ronald S.W. Lew
United States District Judge

CV 90-2660-RSWL - Davis, et al. v. Gates, et al
Cross-Motions for Summary Judgment

#davis3.ord/b

APPENDIX D

CITED PROVISIONS OF THE CONSTITUTION OF THE UNITED STATES

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects' against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly

describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

APPENDIX E

LOS ANGELES ORDINANCE
63.44B (2) PROVIDES:

"No person shall appear, bathe, sunbathe, walk or be in any public park, playground, beach or the waters adjacent thereto, in such a manner that the genitals, vulva, pubis, public symphysis, public hair, buttock's, natal cleft, perineum, anus, anal region, or pubic hair region of any person, or any portion of the breast at or below the upper edge of the areola thereof of any female person, is exposed to public view or is not covered by an opague covering. This subdivision shall not apply to live theatrical performance performed in a theater, concert hall, or other similar establishment located on public land."